BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

OSCAR M. ALDRETE Claimant	)	
VS.	)	
DIANE F. BARGER ATTORNEY Respondent	)	Docket No. **1,057,782**
AND	)	
TECHNOLOGY INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the November 27, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Dennis L. Phelps, of Wichita, Kansas, appeared for claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the November 27, 2012, preliminary hearing transcript, with exhibits thereto; and, all pleadings contained in the administrative file.

The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of employment with respondent on July 21, 2010.

ISSUES

Respondent requests review of whether the ALJ erred in finding claimant's injury arose out of and in the course of employment. Respondent argues that claimant has failed to prove that he suffered a lesion or change in the physical structure of the body. Therefore, the claimant's current condition is directly related to his 2005 accidental injury.

Claimant argues the ALJ's Order should be affirmed.

The issues presented to the Board for consideration are:

1) Whether claimant's accidental injury arose out of and in the course of employment with respondent.

2) Whether the ALJ exceeded his authority in granting benefits.

FINDINGS OF FACT

After reviewing the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact:

Claimant has worked as an interpreter for respondent since 1993. On April 29, 2005, while working part-time for FedEx, claimant sustained a back injury. Claimant received medical treatment, including surgery by Dr. Gery Hsu, in October 2005. Claimant settled his back claim with FedEx on July 25, 2006. The settlement included $10,000 permanent partial disability plus $90,000 for future medical.

Claimant continued working part-time for respondent and began receiving Social Security disability in 2007. Claimant did not have any additional surgeries while he continued to receive medical treatment in 2007, 2008, 2009 and into 2010. Claimant testified:

> Q. How would you describe to the Administrative Law Judge your condition in those months in 2010, particularly in February, April, May, June of 2010 prior to this injury?
>
> A. I felt like I could -- I could control, you know, with the pain medication my condition was controllable, I could function, I could function to a certain degree.
>
> Q. And were you able to do the work activities that --
>
> A. Yes.
>
> Q. -- Ms. Barger's office was requiring of you?
>
> A. Yes, yes, yes.[1]

Claimant described his accident:

> On July 21, 2010, Ms. Barger asked me to go in the file room to move some boxes, put some files in certain boxes. I grabbed one of the boxes and tried to put it on a table. When I did that is when I felt a pop on my back, and pop, severe pop, I felt the severe pain right away down both legs up to the mid-back, low back, down the

[1] P.H. Trans. at 22.

> buttocks. I came out and I was pretty much in tears, I came out of the room pretty much in tears, I said I'm leaving, I go to go to the emergency because I'm in so much pain; and Ms. Barger asked me if she could drive me, and I said, you know, I can pretty much drive myself, so I ended up going to the emergency myself that today.[2]

Claimant testified that he had severe pain after the July 2010 lifting accident. His pain jumped from a 4-5 to an 8-9 on a 1-10 scale with 10 being the worst. The popping sensation was completely different from his first back injury in 2005.

Respondent authorized medical treatment with Kansas University Medical Center and also appointed a nurse case manager, Carolyn Maier. Ms. Maier was present with claimant at his doctor's appointments.

Dr. Lisa Hermes referred claimant to Dr. Doug Burton. Dr. Burton recommended surgery. Respondent sought a second opinion from Dr. Mathew Henry in January 2011. Then on February 23, 2011, Dr. Burton performed a fusion at L5-S1 and at L4-5 disk replacement on claimant's back. Medical treatment continued until September 2011 when Dr. Burton released claimant from his care but also referred claimant to a pain management specialist, Dr. Pedro Murati.

Respondent stopped providing the pain management care so claimant sought treatment on his own with Dr. Jon Parks.

Claimant testified he has continued to work part-time for respondent. Claimant still has pain going down both legs into his feet and pain in his back. He described his pain:

> Q. Describe to me, if you can, then how the pain that you're still experiencing as of today, describe to me how that's different or distinct from the type of pain that you were experiencing, say, in June of 2010 just prior to this July 21, 2010 injury?
>
> A. It's more severe, sharp. The numbness on both legs, I didn't have that before; both legs, feet; upper back, you know, I didn't have that before, the upper back, low back, the pain is more severe pretty much from a five, six to an eight now, you know, four, five to an eight, nine.
>
> Q. Is the -- and you said also now you have it in both legs?
>
> A. Yes, yes, it's both legs.
>
> Q. Whereas before it was primarily --

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[2] P.H. Trans. at 22-23.

A. Primarily in the left leg, yes.[3]

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent injury aggravated, accelerated or intensified the underlying disease or affliction.[7]

ANALYSIS

1) Whether Claimant Suffered an Injury Arising Out of Employment

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[3] P.H. Trans. at 32-33.

[4] K.S.A. 1999 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[6] *Id.*

[7] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

The undersigned Board member agrees with the ALJ that claimant suffered an injury arising out of his employment. The evidence is unrebutted that claimant felt a pop in his back while lifting a box on July 21, 2010. The evidence is unrebutted that claimant sought immediate medical treatment at the Wesley Medical Center's emergency room. The history of injury recorded at Wesley is consistent with the testimony provided by claimant. There is nothing in the record that would support a finding that claimant did not suffer an injury arising out of his employment with respondent that aggravated a preexisting condition.

2) Whether the ALJ Exceeded His Authority

The issue whether a worker is entitled to medical treatment is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.[8] The ALJ has the authority to be wrong on that issue.[9] Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[10] This Board member finds that the ALJ does have jurisdiction to determine if medical treatment is necessary for a compensable injury. Therefore, this issue is not one of which the Board takes jurisdiction in an appeal of a preliminary order.

CONCLUSION

This Board member finds that claimant suffered an injury by accident arising out of his employment on or about July 21, 2010, and that the ALJ has jurisdiction to order medical treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

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[8] K.S.A. 2011 Supp 44-534a(a)(2).

[9] *Dale v. Hawker Beechcraft Acquisition Co., LLC*, Nos. 1,060,057 & 1,051,048, 2012 WL 3279495 (Kan. WCAB July 18, 2012).

[10] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[11] K.S.A. 44-534a.

[12] K.S.A. 2010 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member finds that the November 27, 2012, preliminary hearing Order entered by ALJ John D. Clark is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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John D. Clark, ALJ